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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

July 26, 2011

Re: Pennsylvania Northeastern Railroad, LLC –
Acquisition and Operation Exemption – CSX Transportation, Inc.
STB Docket No. FD 35535
Supplement to Notice of Exemption

Dear Ms. Brown:

On July 22, 2011, the Board issued a notice in the above-referenced proceeding. Footnotes 2 and 3 of the notice suggest additional Board authority is necessary before Pennsylvania Northeastern Railroad, LLC (PNR) can close on the proposed acquisition. PNR files this supplement to explain why such additional authority should not be required.

- (1) *The trackage rights are incidental to the acquisition and no separate authority is required.*

As described in its notice of exemption, PNR is acquiring a freight easement from CSXT. The freight easement relates to rail lines currently owned by SEPTA, a commuter authority serving the Philadelphia region. CSXT is also partially assigning to PNR trackage rights that serve to coordinate the operations on the tracks owned by SEPTA that are subject to the freight easement.¹ Thus, the easement and the trackage rights both contain elements of the operating authority that PNR is acquiring as part of the proposed transaction.

The Board's exemption regulations clearly contemplate the acquisition of "incidental trackage rights" as part of a Section 10901 transaction. "Incidental trackage rights" are defined to include "the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation." 49 CFR 1150.31(a)(4). The trackage rights to be assigned by CSXT to PNR clearly qualify as incidental trackage rights, and no additional authority or filing should be required.

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¹ For the Board's reference, the interrelationship of the freight easement and trackage rights is further described in the enclosed summary of the history of the freight easement and the trackage rights.

Cynthia T. Brown
Page 2

July 26, 2011

- (2) *At the time of the PNR transaction, common control authority will not be required.*

As noted in footnote 3 of the Board's notice, the related continuance in control exemption has not yet been filed. It is intended that a petition for exemption will be filed prior to closing,² and PNR acknowledges that the common control exemption will not be effective by the time of the proposed closing on August 12, 2011. However, the granting of a common control exemption is not a prerequisite for PNR to make the acquisition; it is only a prerequisite, in this instance, for one individual to have authority to be an officer in control of more than one railroad.

In this instance, Mr. Nichini is currently the President of NHRR, an existing Class III railroad. He is also the Chairman of the Board of Managers of PNR, currently a non-carrier. He is only a minority equity holder in each of the two entities. His only potential control would be as a principal officer of each of the two entities. To avoid any violation of the Board's regulations, Mr. Nichini intends to resign as Chairman of PNR prior to closing. Thereafter, he will not serve as an officer or manager of PNR until and unless the Board exempts his common control of PNR and NHRR.³ PNR has hired Willard S. Phillips as President and General Manager, and he will manage the day-to-day operations of PNR until the Board rules on the common control exemption petition. Thus, as of the proposed closing date, Mr. Nichini will not be in control of more than one railroad.

Allowing PNR's acquisition to proceed in these circumstances is no different than allowing a transaction to proceed pending approval of control via stock ownership. Under those circumstances, the Board allows the party seeking control to place its ownership interests in a voting trust until the common control is approved, and allows the underlying acquisition to take place. *See* 49 CFR Part 1013.

² Because PNR and New Hope & Ivyland Railroad (NHRR) will connect, the common control is not eligible for the class exemption available when the commonly controlled railroads do not connect. *See* 49 CFR 1180.2(d)(2).

³ Under 49 CFR 1185.1(a), "STB authorization is not needed for individuals seeking to hold the positions of officers or directors only of Class III railroads." *See also* 49 USC 11328(b). Accordingly, no separate authorization is required to be an officer of both PNR after it becomes a carrier, and NHRR.



Cynthia T. Brown
Page 3

July 26, 2011

CSXT has already provided notice to its employees, as required under their collective bargaining agreements, that operations on the Line will be transferred to PNR as of 12:01 am on August 13, 2011. If the Board delays the closing, CSXT must continue to provide service. To provide service CSXT must notify its employees five days in advance that work on the Line will continue to be provided by CSXT.

Based on the foregoing, PNR requests that the Board advise PNR and CSXT by August 5, 2011, that they can proceed with the transaction as scheduled on August 12, 2011.

Respectfully,

A handwritten signature in black ink, appearing to read "Eric M. Hocky", is written over the printed name.

Eric M. Hocky

*Counsel for Pennsylvania
Northeastern Railroad, LLC*

EMH/e

Enclosure

cc: Louis E. Gitomer, Esq. (w/encl., via e-mail)



Summary of Freight Easement / Trackage Rights

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1. In 1979, pursuant to the Final System Plan, Conrail conveyed by deed to SEPTA all rights, title and interests in and to the railroad properties owned by Conrail (herein "Rail Properties") in the five counties of the Philadelphia region, and Conrail reserved and excepted for itself by permanent easement (the "Freight Service Easement") the right to operate freight service upon portions of the real property conveyed and to use such facilities needed to operate said service;

2. Pursuant to the Northeast Rail Service Act of 1981 ("NRSA"), and in accordance with the Rail Passenger Service Act ("RPSA"), effective January 1, 1983, Conrail was to be relieved of all legal obligations to operate commuter rail service in the Philadelphia region;

3. As required by the NRSA, Conrail and SEPTA, as the regional "Commuter Authority," entered into a transfer agreement (the "Transfer Agreement", dated September 1, 1982) that, in order to effectuate the transfer of commuter rail obligations, identified: the commuter rail service responsibilities and those portions of the Rail Properties that were to be used chiefly for commuter service by SEPTA; those portions of the Rail Properties to be used chiefly in providing freight service by Conrail, and the appropriate trackage rights for operating freight services over certain Rail Properties that were transferred to SEPTA;

4. The rights to access and use the various Rail Properties, and the obligations to maintain the facilities of and to manage and control rail operations on those Rail Properties, were clarified and delineated by and between SEPTA and Conrail in an agreement dated October 1, 1990 (the "Trackage Rights Agreement", which has been modified and amended on various occasions) in order provide for the organized, coordinated, and cooperative operation of both commuter and freight services, by SEPTA and Conrail respectively, over the various Rail Properties.

5. A series of transactions involving Conrail, CSX, and NS were memorialized in a Transaction Agreement among the parties, dated June 10, 1997, and received federal STB regulatory approval under *CSX Corp. et al.-Control-Conrail, Inc. et al.*, 3 S.T.B. 196 (1998). Those transactions resulted in, *inter alia*: 1) the formation of two wholly-owned limited liability companies (New York Central Lines, "NYC" and Pennsylvania Railroad, "PRR") under Conrail; 2) the conveyance of certain portions of the Rail Properties to the limited liability companies, including (i) portions of the Rail Properties over which SEPTA operates commuter rail service, and (ii) Conrail's freight operating rights on portions of the Rail Properties; and 3) CSX's and NS's acquisition of control, in common, of Conrail (with the entity now owned jointly by CSX and NS being known as Conrail Shared Assets Operator, which shall be referred to herein as "Shared Assets");

6. Under the Transaction Agreement, it was contemplated that: 1) Conrail, CSX and NS would operate some freight services as sole operators over some portions of the Rail Properties and some freight service jointly with SEPTA passenger service over other portions of the Rail Properties; 2) CSX and NS would enter into leases and/or operating agreements with their respective railroad operating affiliates, CSXT and NSR, to conduct the aforementioned freight operations on behalf of CSX and NS; and 3) SEPTA would continue to have the right to conduct passenger operations over certain portions of the

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Rail Properties as the sole operator and over other portions as a joint operator with freight operations.

7. In order to carry-out the intentions of the Transaction Agreement once the applicable conditions were satisfied and final regulatory approval was received, CSX, NS, Conrail and SEPTA entered into an agreement dated June 1, 1998 (which will herein be referred to as the "Freight/Passenger Operator Agreement") that: 1) required that NYC and PRR enter into operating agreements to allow CSXT and NSR (referred to herein collectively as "Freight Operators", or "Freight Operator" in the generic singular) to conduct freight operations on behalf of CSX and NS, respectively; and 2) governed and specified the terms and conditions applicable to freight operations conducted by the Freight Operators and Shared Assets, and to passenger operations conducted by SEPTA over portions of the Rail Properties shared with freight operations.

8. NYC was merged into CSXT and PRR was merged into NSR pursuant to *CSX Corp. et al.-Control-Conrail Inc. et al.-Supp. Order*, 7 S.T.B. 205 (2003) and CSXT and NSR became owners of the assets owned by NYC and PRR, respectively, including the Rail Properties.

9. CSXT now desires to convey by sale to the Pennsylvania Northeastern Railroad LLC ("PNR"), a portion of CSXT's rights and obligations under the Freight Service Easement to operate freight services on certain portions of the Rail Properties and to modify applicable terms and provisions of the Freight/Passenger Operator Agreement and the Trackage Rights Agreement in order, *inter alia*, have PNR be made a party to those agreements.

10. CSXT, NS, PNRR, SEPTA and Conrail are agreeable to the proposed modifications, and as such, the Trackage Rights Agreement and the Freight/Passenger Operator Agreement are being modified by a Supplemental Agreement (for simplicity all agreements, including the Supplemental Agreement, will be referred to by the parties in the future as the "Trackage Agreements"), and will include PNR both as a contracting party with and in addition to the other four parties, and as a "Freight Operator" under the Trackage Agreements.